



SO ORDERED.

SIGNED this 29 day of December, 2005.

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**

A handwritten signature in black ink, appearing to read "Richard Stair Jr.", is written over a horizontal line.

**Richard Stair Jr.
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-34704

PARADISE VALLEY HOLDINGS, INC.
d/b/a ACE TV RENTAL
d/b/a CHOICE RENT TO OWN

Debtor

**MEMORANDUM AND ORDER ON MOTION FOR LIMITED
EXPEDITED DISCOVERY IN ADVERSARY PROCEEDINGS**

Presently before the court is the Motion for Limited Expedited Discovery in Adversary Proceedings (Motion) filed in the Debtor's bankruptcy case on December 22, 2005, by the Chapter 7 Trustee, G. Wayne Walls (Trustee), requesting the court to allow expedited discovery pursuant to Rule 26(d) of the Federal Rules of Civil Procedure, in approximately 165 recently filed adversary proceedings in which he is the Plaintiff. Attached as Exhibit 1 to the Motion is a document entitled "Form Requests for Production of Documents" to be served on the various Defendants, requesting production of the following concerning Paradise Valley Holdings or SRK Management or any of

their affiliates, subsidiaries, or agents between May 1, 2003, and August 31, 2003: (1) all checks; (2) all invoices or other billing documents; (3) an itemization of all funds received, including the amount, the date, from whom, and when the debt became due; and (4) any correspondence between the defendant and those entities.

Also filed along with the Motion was a Notice of Hearing, scheduling a hearing on the Motion for January 12, 2006. The certificates of service for the Motion and Notice of Hearing evidence that they were served only upon six attorneys and the United States Trustee. The Motion was not filed in any of the individual adversary proceedings, and none of the Defendants was served with a copy of the Motion or the Notice of Hearing. In effect, the Trustee requests ex parte relief.

As an initial matter, the Motion is procedurally defective because it was filed in the Debtor's bankruptcy case rather than in the individual adversary proceedings, and it was not served upon the individual Defendants against whom the Trustee is seeking discovery. Rule 5(a) of the Federal Rules of Civil Procedure, which is applicable to adversary proceedings by virtue of Federal Rule of Bankruptcy Procedure 7005, provides in material part:

Except as otherwise provided in these rules, . . . every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, [and] every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte . . . shall be served upon each of the parties.

FED. R. CIV. P. 5(a). Moreover, "the adverse party shall be presumptively entitled to notice and an opportunity to be heard prior to any ruling [by the court]." *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D. Ariz. 2001).

For future guidance, the court will also advise the Trustee that the Motion is likewise substantively defective because it does not offer proper cause for granting expedited discovery. “Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).” FED. R. CIV. P. 26(d) (applicable to adversary proceedings pursuant to FED. R. BANKR. P. 7026). “‘Although [Rule 26(d)] does not say so, it is implicit that some showing of good cause should be made to justify such an order.’” *Mitra v. State Bank of India*, 2005 U.S. Dist. LEXIS 19138, at *26 (S.D.N.Y. Sept. 6, 2005) (quoting Charles Alan Wright, et al., 8 FEDERAL PRACTICE & PROCEDURE CIVIL § 2046.1 at 592 (2d ed. 1994)). “[W]here a plaintiff seeks expedited discovery to prepare for a preliminary injunction hearing, it makes sense to examine the discovery request, as we have done, on the entirety of the record to date and the reasonableness of the request in light of all of the surrounding circumstances[.]” *Merrill Lynch, Pierce, Fenner & Smith v. O’Connor*, 194 F.R.D. 618, 624 (N.D. Ill. 2000). “Because [e]xpedited discovery is not the norm[, the].Plaintiff must make some prima facie showing of the need for the expedited discovery.” *O’Connor*, 194 F.R.D. at 623. Additionally, when applying the good cause standard, “the court should consider the scope of the requested discovery.” *Qwest Commc’ns Int’l Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 420 (D. Colo. 2003).

“Good cause may be found where the plaintiff’s need for expedited discovery outweighs the possible prejudice or hardship to the defendant.” *Metal Bldg. Components, LP v. Caperton*, 2004 U.S. Dist. LEXIS 28854, at *10 (D.N.M. Apr. 2, 2004). Good cause is usually found in cases

involving requests for injunctive relief, challenges to personal jurisdiction, class actions, and claims of infringement and unfair competition. *See Mitra*, 2005 U.S. Dist. LEXIS 19138, at *26; *Dimension Data N. Am., Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528, 531 (E.D.N.C. 2005); *Whitfield v. Hochshield*, 2002 U.S. Dist. LEXIS 12661, at *4 (S.D. Ohio June 27, 2002); *Pod-Ners, LLC v. N. Feed & Bean of Lucerne, LLC*, 204 F.R.D. 675, 676 (D. Colo. 2002). Nevertheless,

[Rule 26(d)] protects defendants from unwarily incriminating themselves before they have a chance to review the facts of the case and to retain counsel. This important protection maintains the fairness of civil litigation. Courts should not grant leave without some showing of the necessity for expedited discovery. The court must protect defendants from unfairly expedited discovery.

Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982) (internal citation omitted)

The Trustee states that he needs the Defendants to produce checks, invoices, letters, and other documents concerning Paradise Valley and/or SRK Management so that he can “fully evaluate and document the preferential transfer claims” and he seeks them “as early as possible in order to appropriately and efficiently evaluate early settlement offers and otherwise properly evaluate the merits of the adversary proceedings prior to engaging in more extensive discovery and motion practice.” He also states that the books and records of the Debtor “are in disarray and many of the records cannot be located.” These reasons do not constitute good cause and are inappropriate for granting the Motion. The Trustee has not sought injunctive relief, nor does it seem warranted in these preferential transfer lawsuits. The adversary proceedings do not involve a class action, unfair competition, or infringement issues. Additionally, the requests themselves are overly broad and could cause the Defendants to “unwarily incriminate” themselves. The Trustee should have “properly evaluate[d] the merits of the adversary proceedings” prior to filing the complaints, and

he cannot expect the various Defendants to prove his case against them. Unless the Trustee has evidence of good cause, including irreparable prejudice or destruction of documents, the court will not grant a motion for expedited discovery filed in any of the adversary proceedings.

For the reasons set forth above, the court directs the following:

1. The Motion for Limited Expedited Discovery in Adversary Proceedings filed by the Trustee on December 22, 2005, is DENIED.

2. The hearing on the Motion for Limited Expedited Discovery in Adversary Proceedings noticed by the Trustee for January 12, 2006, at 9:00 a.m., is STRICKEN.

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